

Practical challenges and concerns iro retrospective application of sections 6A, 7A and 8A

Concern	Comments / Proposed solution
There may not be any budget left for new negotiations (PASA, FIAPF);	<p>The percentage is only iro future royalty earnings, so strictly speaking, the section requires payment of a portion of money to be received.</p> <p>However, these future earnings may have been included in the budget as projected revenue, so it may be covering losses suffered in the past.</p>
The negotiated price at the time of assignment of ownership of copyright would not have taken into account perpetual future royalties (ReCreate, USAf);	<p>This concern could be raised with the author and if the author does not acknowledge that he / she did receive a larger sum at the outset than would have been the case if this section was operational before, the matter could be referred to the Tribunal, who would then take that into account.</p>
<p>Persons are expected to trace each other down and renegotiate terms that were agreed to possible years ago under very different circumstances.</p> <p>(Kagiso; Karjiker; SAIPL, SASOL; USAf)</p>	<p>This is a concern as there is no cut-off date iro how far back the retrospectivity goes. Tracing either the copyright owner or the author may be impossible.</p> <ul style="list-style-type: none"> - If the author cannot be traced, the orphan works clause applies, but what if the copyright owner cannot be found? Who will know and who will trace that copyright owner? - A proposal was made to allow a period in which authors could approach the Minister / CIPC / (...). This might allow for some certainty. So if no author has registered a work in this regard in for example 5 years, the copyright owner knows that the matter is closed. - Another proposal would be to only have reciprocity go as far back as 1978 with the commencement of the Copyright Act, so as to allow for certainty.

	These solutions would have to be advertised
<p>The contracts that have been legally concluded in the past were only concluded on the basis of the facts before the parties at that given point in time.</p> <p>Numerous financial transactions could have been entered into already relying on the outright assignment and, retrospectivity would create major challenges for the assignee.</p> <p>(Kagiso; Karjiker; SAIPL, SASOL; Spoor & Fisher; USAf)</p>	
Potentially affect existing successful business arrangements and would wreak havoc on existing relationships, business models, forecasts and cost structures (Matzukis, NAB, USAf, ReCreate, Stellenbosch University)	
How would this affect non-profit organisations? (TAB, SANCB)	<p>Non-profit organisations could be excluded so that where a NPC / NPO obtained copyright or a licence, sections 6A, 7A and 8A would not apply to that transaction</p> <p>This solution would have to be advertised</p>
Instead of agreements with agencies, the assignee will now have to enter into multiple contracts – often works have multiple authors (Sasol)	<p>Where multiple agreements were entered into in the past, it would be even more complicated to find all the role players and the share of the royalty will have to take all role players into account. This could be resolved through the Tribunal if the parties do not agree on the “sharing” of the share</p>
The open-ended character of this clause may well succeed in inundating the Tribunal with a plethora of disputes wherein it has to adjudicate on the negotiations of royalties of cases prior to the coming into effect of the Copyright Amendment Act (PEN)	

<p>Many contractual rights would since have been ceded or assigned to other parties and many new ventures involving different parties would have been undertaken and initiated on the basis of existing contracts. This amendment would forcibly disturb and modify existing and legally valid contractual relationships. (SAIPL)</p>	
<p>If the royalty is not negotiated within 48 months, is the right to do so forfeited? (Sasol)</p>	
<p>Where the author is deceased and the copyright has not expired yet, does the right to negotiate a royalty apply to the authors' heir(s)? (Sasol)</p>	
<p>The products, may in some instances have been damaged or deteriorated, and may have lost value over time (USAf).</p>	<p>The percentage is only iro future royalty earnings, so strictly speaking, the section requires payment of a portion of money to be received. If the products is no longer being used, there would not be royalties</p> <ul style="list-style-type: none"> - We could address this by excluding the application of ss 6a, 7A and 8A where the work is no longer being used or has been destroyed.
<p>The market for creative works could have been seriously disrupted or damaged. (USAf)</p>	<p>The percentage is only iro future royalty earnings, so strictly speaking, the section requires payment of a portion of money to be received. If the products is no longer being used, there would not be royalties</p> <ul style="list-style-type: none"> - We could address this by excluding the application of ss 6a, 7A and 8A where the work is no longer being used or has been destroyed.
<p>Creating debt, i.e. is someone expected to sell their house for example? (No safeguards).</p>	

<p>What happens when the work is in the public domain as the copyright term is over, or when the copyright protection still exists but the work has been donated or is being used under a creative commons license.</p>	
<p>The unintended effect of business not being able to cope and therefore closing down.</p>	
<p>Will create problems for purchasers who entered into sales at fixed or negotiated prices and now have to pay perpetual royalties – products may have deteriorated or damaged.</p>	
<p>The practicality of parties obligation to renegotiate a royalty percentage is a concern.</p>	
<p>S6A(5)(a) creates an obligation on the parties to negotiate a royalty agreement, no waiver on the right for the author to contract out of the entitlement to receive a royalty.</p>	
<p>It will be disruptive to existing commercial agreements. It will adversely affect the rights of parties and may open the floodgates of litigation. (NAB)</p>	